

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

MAR 5 1982

H. Stuart Cunningham, Clerk
United States District Court

ATARI, INC.,
a Delaware corporation, and
MIDWAY MFG. CO.
an Illinois Corporation
Plaintiffs,

vs.

NORTH AMERICAN PHILIPS
CONSUMER ELECTRONICS CORP.,

a Tennessee corporation,

PARK TELEVISION d/b/a
PARK MAGNAVOX HOME ENTERTAINMENT
CENTER,

an Illinois partnership, and

ED AVERETT,

an individual,

Defendants.

Civil Action No.

81-C-6434

Judge Leighton

AMENDED COMPLAINT

Plaintiffs ATARI, INC., and MIDWAY MFG. CO. for their
amended complaint against defendants North American Philips
Consumer Electronics Corp. and Park Television d/b/a Park
Magnavox Home Entertainment Center, state:

PARTIES

1. Plaintiff, ATARI, INC. ("ATARI"), is a Delaware corporation with its principal place of business in Sunnyvale, California. ATARI is a leading developer and manufacturer of home video games and personal computers. ATARI owns the exclusive rights under copyrights to numerous audiovisual works, including the exclusive rights in the United States for home video and personal computer use for the PAC-MAN video game described below.

2. Plaintiff MIDWAY MFG. CO. ("MIDWAY") is an Illinois corporation with its principal place of business at Franklin Park, Illinois. MIDWAY is a leading developer and manufacturer of coin-operated video games. MIDWAY owns exclusive rights under copyrights to numerous audiovisual works and is the owner of the United States copyright and trademark to the PAC-MAN audiovisual work described below.

3. On information and belief, defendant NORTH American Philips Consumer Electronics Corp. ("North American") is a Tennessee corporation, with its principal place of business in Knoxville, Tennessee. North American or a North American agent has an office and place of business in this District. North American itself or through its subsidiaries, agents or affiliated or related corporations manufactures and sells or causes to be manufactured and sold home video games, including the K.C. Munchkin home video game described below.

4. Defendant Park Magnavox Home Entertainment Center ("Park") is an Illinois partnership with its principal

office and place of business at 3634 West 95th St., Evergreen Park, Illinois 60642. Park is a retailer of audio visual equipment including home video game consoles and cartridges including the K.C. Munchkin video game.

5. On information and belief, defendant Ed Averett ("Averett") is an individual residing in Hixson, Tennessee. Averett is a computer programmer, who along with his wife, developed a home video game known as K.C. Munchkin and other home video games for North American or a corporation related to it. Averett developed K.C. Munchkin with the intent and knowledge that North American directly or indirectly would distribute it nationally. Averett has received and continues to receive royalties or other payments from North American or a corporation related to it resulting from his development of and the nationwide sales of K.C. Munchkin.

JURISDICTION AND VENUE

6. The claims in this Amended Complaint arise under the Copyright Laws of the United States, 17 U.S.C. §§101 et seq., the Lanham Act of 1946 as amended, 15 U.S.C. §§1051 et. seq., the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat. Ch. 121-1/2, §§311-317, and the common law. This Court has federal question jurisdiction pursuant to 28 U.S.C. §1331(a)(2) and 1338(a) and has pendant jurisdiction over the state law claims under 28 U.S.C. §1338(b). Venue is proper under 28 U.S.C. §§1391(d) and 1400(a). Acts giving rise to the causes of action alleged herein have occurred, and are occurring, in the this District.

Namco-America, Inc. granted to ATARI the exclusive right in the United States and its territories in the copyright and trademark for the PAC-MAN audiovisual work for home video games and personal computers including exclusive rights under Certificate of Registration No. 83-768. An agreement transferring to ATARI the exclusive rights under copyright and trademark in the PAC-MAN audiovisual work was filed with the Copyright Office for recordation on November 12, 1981. A copy of the agreement recording the transfer rights to Atari in the Copyright Office is attached to this Amended Complaint as Exhibit B.

11. ATARI holds the exclusive right under all copyrights to the PAC-MAN audiovisual work for home video games and personal computers in the United States and its territories. The Exhibit B Agreement also granted to ATARI exclusive license rights to the trademark PAC-MAN for use on or in connection with home video games and personal computers in the United States. ATARI has announced the introduction and will introduce the ATARI PAC-MAN home video game throughout the United States in March 1982.

12. North American and Averett have infringed the copyright in the PAC-MAN audiovisual work by reproducing, selling and otherwise distributing and by performing and displaying unauthorized copies of and/or a derivative work based upon the PAC-MAN audiovisual work under the name K.C. Munchkin.

13. NORTH AMERICAN and Averett are aiding and abetting others to distribute K.C. Munchkin and to publicly perform K.C. Munchkin in retail stores and to induce sales to consumers in violation of plaintiffs' rights.

14. ATARI and MIDWAY have expended considerable effort and sums of money in developing, manufacturing, advertising, distributing and marketing PAC-MAN in the United States. To date, MIDWAY has sold in excess of 95,000 coin operated PAC-MAN video games at a wholesale price in excess of \$175 million dollars. ATARI has booked orders for over one million PAC-MAN home video games.

15. As a result of MIDWAY's advertising, promotion and sales, the public has come to identify the mark PAC-MAN and the non-functional design features of PAC-MAN with MIDWAY. Both the mark PAC-MAN and the non-functional design features of the PAC-MAN audiovisual work have acquired a secondary meaning associating them with MIDWAY.

16. Defendants have simulated the non-functional design features of PAC-MAN in K.C. Munchkin, which defendants have sold, advertised, and offered for sale.

17. Defendants have aided and abetted and have knowingly induced others to sell, advertise and offer for sale K.C. Munchkin as a home version of PAC-MAN, thus creating the false impression that K.C. Munchkin is somehow backed by, sponsored by, made by or otherwise associated with plaintiffs. Defendants' conduct as hereinabove alleged has confused and is likely to confuse the public.

18. North American directly or indirectly is advertising, distributing, and selling its infringing K.C. Munchkin home video game on a nationwide basis. A full page color advertisement for the K.C. Munchkin home video game appeared in

the November 16, 1981 issue of Newsweek magazine. A copy of the advertisement is attached to this Amended Complaint as Exhibit D. North American has also directly or indirectly advertised the K.C. Munchkin home video game in Time, People and various inflight airline magazines. North American directly or indirectly also engaged and is currently engaging in a nationwide television advertising campaign for K.C. Munchkin.

19. Averett licensed, assigned and/or otherwise conveyed the rights in K.C. Munchkin with the intent and knowledge that North American would advertise, market, and distribute K.C. Munchkin for retail sale. North American and Averett have provided and are currently providing distributors and retail dealers with the instrumentality and opportunity to engage in deceptive and unfair trade practices and, on information and belief, Averett and North American, directly or indirectly, have caused, encouraged and contributed to such deceptive and unfair trade practices. These deceptive and unfair trade practices include passing off the K.C. Munchkin home video game as a PAC-MAN game; causing a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of K.C. Munchkin home video game; causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with or certification by plaintiffs; and otherwise engaging in conduct which creates a likelihood of confusion or of misunderstanding. In addition, the distribution for retail sale of the K.C. Munchkin home video game has provided and is currently providing distributors

and retail dealers with the instrumentality and opportunity to infringe the PAC-MAN copyright.

20. North American's distributors, or distributors of a corporation related to North American have and are currently holding out the K.C. Munchkin home video game as a PAC-MAN game, as exemplified by the advertisement from the November 13, 1981 issue of the Chicago Sun-Times, a copy of which is attached to this Amended Complaint as Exhibit E. North American or a corporation related to it and its distributors have otherwise passed K.C. Munchkin off as the PAC-MAN home video game, have otherwise unfairly competed with ATARI, and have confused and deceived consumers.

21. North American's direct or indirect infringement of the PAC-MAN copyright, its simulation of the nonfunctional design features of the PAC-MAN audiovisual work, its unfair competition and its unfair and deceptive trade practices in relation thereto have been willful and deliberate and will continue to plaintiffs' irreparable harm unless enjoined by this Court.

22. Averett's activities in developing and promoting PAC-MAN for home video use in K.C. Munchkin constitutes willful and deliberate infringement of the PAC-MAN copyright unfair competition.

23. Defendant Park has infringed the copyright in the PAC-MAN audiovisual work by selling and otherwise distributing the K.C. Munchkin home video game and by performing and displaying the K.C. Munchkin home video game.

24. ATARI has notified defendants of these infringements of ATARI's exclusive rights in the PAC-MAN copyright and of the other violations herein alleged and of the filing of this action.

COUNT ONE

Copyright Infringement

25. Paragraphs 1 through 24 are incorporated by reference.

26. The aforesaid acts of North American, Park, and Averett constitute copyright infringement in violation of 17 U.S.C. §§106 and 501.

COUNT TWO

Federal Unfair Competition

27. Paragraphs 1 through 24 are incorporated by reference.

28. The aforesaid acts of North American, Park, and Averett constitute false representations that K.C. Munchkin is sponsored by, authorized by, or affiliated with plaintiffs in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

COUNT THREE

Deceptive Trade Practices

29. Paragraphs 1 through 24 are incorporated by reference.

30. The aforesaid acts of North American, Park, and Averett constitute deceptive trade practices in violation of

the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat. Ch. 121-1/2, §§311-317.

COUNT FOUR

Common Law Unfair Competition

31. Paragraphs 1 through 24 are incorporated by reference.

32. The aforesaid acts of North American, Park, and Averett constitute improper and unfair competition with plaintiffs in violation of plaintiffs' rights at common law.

PRAYER OF RELIEF

WHEREFORE, plaintiffs pray that this Court:

(a) declare that defendants North American, Park, and Averett have infringed the PAC-MAN copyright;

(b) temporarily restrain and preliminarily and permanently enjoin defendants North American, Park and Averett and all their employees, servants, agents, distributors and persons in active concert with them from displaying, performing, advertising, promoting, selling or offering for sale, or otherwise distributing the K.C. Munchkin video game or otherwise infringing the PAC-MAN copyright;

(c) order the impounding for destruction all copies or reproductions of North American's infringing K.C. Munchkin home video games, and all plates, masters, tapes, film negatives, cassettes, circuit boards, computer programs and other means for producing such copies, and all advertisements and promotional literature therefor;

(d) order that North American immediately require its distributors to cease and desist all advertising, marketing, offering for sale and selling of K.C. Munchkin home video game;

(e) order North American to recall from its distributors all copies or reproduction of the K.C. Munchkin home video game;

(f) order an accounting of North American's, Park's and Averett's profits (including Averett's royalties) and award plaintiffs their actual and/or statutory damages including treble damages for willful violation;

(g) award plaintiffs punitive damages for the willful and wanton nature of North American's and Averett's acts equal to at least three times plaintiffs' actual or statutory damages;

(h) order that North American, Park, and Averett file with this Court, and to serve upon plaintiffs within ten

(10) days after service upon North American and Park of this Court's injunction issued in this action, a written report under oath setting forth in detail the manner and form in which North American and Park have complied with such injunction;

(i) award plaintiffs interest, costs, and attorney's fees; and

(j) award plaintiffs such other and further relief
as this court deems just and appropriate.

DATED: February 24, 1982

Respectfully submitted,



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